U.S. Department of Labor

Office of Administrative Law Judges
11870 Merchants Walk - Suite 204
Newport News, VA 23606

(757) 591-5140
(757) 591-5150 (FAX)

Issue Date: 04 December 2006

CASE NO.: 2004-BLA-6327

In the matter of:

W.M.,
Claimant,

v.

WHITAKER COAL CORP.,
Employer,

and

SUN COAL CO. c/o
ACORDIA EMPLOYERS SERVICE,
Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest.

Appearances: Monica Rice Smith, Esq.
For the Claimant

Lois A Kitts, Esq.
For the Employer/Carrier

Before: Daniel A. Sarno, Jr.
District Chief Administrative Law Judge

DECISION AND ORDER AWARDING LIVING MINER'S BENEFITS

This case arises from a claim for benefits filed under the "Black Lung Benefits Act," Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, at 30 U.S.C. §

901 *et seq*. ("Act"), and the implementing regulations at 20 C.F.R. Parts 718 and 725 (2006).[1] A hearing was held in Hazard, Kentucky on February 7, 2006. The decision in this matter is based upon the testimony of Claimant at the hearing, all documentary evidence admitted into the record at the hearing, and the post-hearing arguments of the parties. Although not specifically mentioned in this decision, each exhibit received into evidence has been carefully reviewed, particularly those relating to the Claimant's medical condition. The documentary evidence admitted at the hearing includes Director's Exhibits (Dx.) 1-32, Claimant's Exhibits (Cx.) 1, and Employer's Exhibits (Ex.) 1, 2. The transcript of the hearing is cited as (Tr.) and by page number.

Overview of the Black Lung Benefits Program

The Black Lung Benefits Act is designed to compensate those miners who have acquired pneumoconiosis, commonly referred to as "black lung disease," while working in the Nation's coal mines. Those miners who have worked in or around mines and have inhaled coal mine dust over a period of time, may contract black lung disease. This disease may eventually render the miner totally disabled or contribute to his death.

Procedural History

This case has an extensive history.[2] Unfortunately, it is a procedural history that contains legal errors that sent it meandering down the wrong judicial paths. I will now go over that history in some detail.

The Claimant's original claim was received by the Division of Coal Mine Workers' Compensation (DCMWC) on March 22, 1996. This claim was preliminarily denied by the District Director on August 14, 1996, it was thereafter referred to the Office of Administrative Law Judges (OALJ) where a Decision and Order Denying Benefits was issued on the merits by Administrative Law Judge (ALJ) Lindeman on September 9, 1997.

Claimant appealed ALJ Lindeman's ruling to the Benefits Review Board ("BRB" or "Board") on September 12, 1997. On November 5, 1997 the District Director filed a Director's Motion to Remand, giving as justification the Director's statutory obligation to provide the miner a complete credible pulmonary evaluation addressing all elements of entitlement. The Board issued an Opinion on September 10, 1998, where the ALJ's Decision and Order denying benefits was Affirmed in part, Vacated in part and the case was Remanded to the District Director to provide for a complete pulmonary examination of Claimant and for Reconsideration of the merits of the claim in light of the new evidence.

The Employer filed a Motion for Reconsideration and Suggestion for Rehearing *En Banc* on October 2, 1998. The Board issued a Decision and Order on Reconsideration *En Banc* on

[1] This claim is being decided under the pre-January 19, 2001 regulations, though I will cite to 2006 regulations unless there is a specific difference, and then that will be noted.

[2] I am captioning this case now as 2004-BLA-6327, but in actuality it is a continuation of the original claim captioned 97-BLA-333 that was decided by Administrative Law Judge Lindeman. Administrative Law Judge Jansen issued the subsequent Decision and Order on Remand captioned under the case number 2000-BLA-1017.

April 7, 1999, granting the Employer's Motion for Reconsideration *En Banc*, but denying the relief requested and affirming their prior decision, except as to vacating the ALJ's finding of the existence of pneumoconiosis. The Board held that the Employer must be allowed to contest all issues of entitlement on remand, given that the Director, in his Motion to Remand, had requested clarification of the Department of Labor (DOL) provided complete pulmonary examination of Claimant.

On July 14, 1999, the Claimant requested a formal hearing before the OALJ. The District Director did not forward the claim as per the regulations. There were the usual delays that arise with requests for discovery, and then an Order to Show Cause Abandonment of Claim/Denial was issued by the District Director on November 2, 1999. Shortly thereafter, Claimant rescheduled and attended the Employer requested black lung examination. On February 16, 2000, the Claimant made another request for a formal hearing before the OALJ. The District Director did not forward the claim as per the regulations. Instead, on May 18, 2000, the District Director issued a Proposed Decision and Order Memorandum of Conference, Denial of Benefits. On May 23, 2000, the Claimant again requested a formal hearing before the OALJ. The District Director did not forward the claim as per the regulations. Finally, on August 21, 2000, the District Director issued the CM-1025 transmittal package and forwarded the claim to the OALJ for adjudication as per the regulations.

On October 31, 2000, ALJ Jansen issued the Notice of Hearing, scheduling the hearing for Tuesday, February 27, 2001. On September 11, 2000, the Employer made a request to the OALJ to request a decision on the record. On November 16, 2000 and October 20, 2000, the Claimant and District Director, respectively, notified the OALJ that they had no objection to ALJ Jansen issuing a decision on the record. On February 2, 2001, ALJ Jansen issued an Order that the case would be decided on the record and the formal hearing set for February 27, 2001, was canceled; furthermore it was ordered that the record would be held open until March 23, 2001 for the ordered filing of "post-hearing" briefs.

Because of the revisions to the Federal Regulations that govern Federal Black Lung claims that went into effect on January 19, 2001, District Judge Sullivan issued a Preliminary Injunction Order on February 9, 2001. This Order stated, *inter alia*, that all claims pending before the OALJ will be stayed for the duration of the pending litigation surrounding the implementation of the new regulations, except where the adjudicator, after briefing by the parties to the pending claim, determines that the regulations at issue in the instant lawsuit will not affect the outcome of the case. On February 15, 2001, ALJ Jansen issued an Order to submit briefs addressing the issue of the new regulations as they will affect the pending case. By Director's Brief, received February 22, 2001, the Director stated he currently foresees a possible effect on the outcome of the pending claim due to the revisions in Parts 718, which are subject to the Preliminary Injunction Order. The Employer's Brief delivered on February 21, 2001 stated that the amended regulations should not affect the outcome of the pending case, except if the ALJ were to make a finding of pneumoconiosis, then the Employer would ask that the case be stayed until the District Court renders a final decision. The claimant never submitted a brief. On March 30, 2001, ALJ Jansen determining that the amended regulations will not affect the outcome of the pending case and issued an Order Denying Request for Stay.

On May 7, 2001, ALJ Jansen issued a Decision and Order on Remand – Denying Benefits, in which he determined that the Claimant met none of the requirements for entitlement.[3] On May 30, 2001, Claimant filed a Notice of Appeal. On June 4, 2001, the Board acknowledged receipt of the appeal and subsequently received briefs for and against, from Claimant and Employer respectively.

Problems Begin

On December 26, 2001, Claimant files a Motion to Remand in Order to Voluntarily Withdraw Claim, stating therein, "he no longer wishes to pursue his claim for Federal Black Lung benefits as he feels it would be in his best interest to file a new claim under the January 2001 amendments to 20 CFR Part 718, *et al.*" Dx. 1, at 215. The Employer, by brief dated January 9, 2002, vigorously objected to Claimant's Motion to Remand. Dx. 1, at 206-09. The Board responded on January 11, 2002, stating they lacked jurisdiction to grant Claimant's motion to withdraw his claim. Dx. 1, at 212. On January 16, 2002, the case file was remanded to the District Director. Dx. 1, at 210-11.

Problems Escalate

On March 4, 2002, the District Director issued an Order granting the withdrawal of Claimant's case stating, "[t]he claim was reviewed and it was determined as no benefits were issued on the record, it would be in the Claimant's best interests to allow the withdrawal so the claimant could pursue a claim under the new regulations." Dx. 1, at 202-05. On April 9, 2002, Claimant files a new application for benefits under the Black Lung Benefits Act. Dx. 1, at 193-96. A new record began to be created, including *inter alia*, a DOL sponsored complete pulmonary evaluation. Additionally, both sides started discovery and generating medical evidence under the new regulations at 20 C.F.R. §725.414.[4]

One Mistake Caught, But Others Added

The District Director by Decision issued March 24, 2003, vacates the March 4, 2002 Order Granting Withdrawal, as contrary to Board precedent in *Clevenger v. Mary Helen Coal Co.*, BRB No. 01-0884 BLA (August 30, 2002) (holding that the adjudicator is without authority to grant withdrawal where there is a decision on the merits of the claim, as in this case). Dx. 1, at 11. The March 24, 2003 Order stated:

> We must therefore vacate the order of withdrawal. However, we find that your new application was submitted within one year of the denial of your prior claim. We will consider your new application as a request for modification of the prior denial, in accordance with the regulations at 20 CFR 725.310.

[3] To establish entitlement to benefits a miner must prove by a preponderance of the evidence that he has pneumoconiosis, that his pneumoconiosis arose from coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. 20 C.F.R. § 725.202(d).

[4] The claim was being processed as if no prior claim had existed since the prior claim had been withdrawn by the District Director.

Id. This legal error was further amplified when the Order additionally stated:

> **If you do wish for the application filed April 9, 2002, to be considered as a request for modification, you should notify this office in writing. If you do not pursue modification proceedings, you have the right to file a new claim at anytime because a year has elapsed since the most recent decision was issued in your claim.** [5]

Dx. 1, at 12 (emphasis in original). On April 14, 2003, Claimant wrote and requested that his application for benefits dated April 9, 2002, not be treated as an appeal and/or modification. Dx. 1, at 4. By Order of April 25, 2003, the District Director deleted the reconsideration data set for the "LM 1 claim," and further stated that the Claimant's April 17, 2003 application be treated as a new claim. Dx. 1, at 3.

Correction

Under the regulations, because the District Director's actions on the request for withdrawal were improper, the March 22, 1996 claim is still pending. (i.e., there is no valid action by the District Director handling the remand directives of the Board – had the District Director denied the motion to withdrawal and reinstated the denial of benefits at the time, and then no action was taken, I would be left with a different scenario). Under the circumstances of this case, the April 9, 2002 "application" for benefits merges with the original March 22, 1996 claim. 20 C.F.R. § 725.309(b). Still, there is no valid District Director action resolving the Board's remand directives dated January 11, 2002 for the original March 22, 1996 claim by the time the April 17, 2003 "application" for benefits was filed.[6] **Thus, it too, merges with the original 1996 claim.**

I incorporate by reference the findings of Judge Jansen and proceed on the merits of the case under the old, pre-2001 amendment, evidentiary regulations.[7]

Issues Presented for Adjudication

1) Whether the miner suffers from pneumoconiosis;
2) Whether the Pneumoconiosis arose out of coal mine employment;
3) Whether the miner is totally disabled;
4) Whether the pneumoconiosis contributes to the total disability; and
5) Whether the miner's grandson is a qualified dependent for purposes of augmentation.

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[5] The District Director is without authority to *sua sponte* rewrite the technical regulatory requirements, or to offer such an option to the parties. These determinations of how a claim is to proceed are laid out in § 725.309 and are not to be arbitrarily decided by the Claimant or the District Director. The District Director should have reinstated the Denial of Benefits in the Order dated March 24, 2003.

[6] Now we are to the present claim, the one I held a hearing for in Hazard, Kentucky on February 7, 2006.

[7] The case is not being remanded to reopen the record for additional medical evidence. This is the third complete development of the record in this case and as such there is more than enough evidence in the record for me to render an informed and impartial decision. *See Underwood v. Elkay Mining Inc.*, 105 F.3d 946 (4th Cir. 1997).

Dx. 30; Tr. at 5-8; 12-14; 25,26. The Employer also contested numbers 1, timeliness, and 14, subsequent claim, from the CM-1025. Dx. 30. Though, as evidenced from the extensive correction of the procedural history those are no longer issues in contention.

The Standard for Entitlement

Because this claim was filed after April 1, 1980, it is governed by the regulations at 20 C.F.R. Part 718.[8] Under Part 718, Claimant bears the burden of establishing each of the following elements by a preponderance of the evidence: (1) he suffers from pneumoconiosis; (2) arising out of coal mine employment; (3) he is totally disabled; and (4) his total disability is caused by pneumoconiosis. *Gee v. W.G. Moore & Sons*, 9 B.L.R. 1-4 (1986)(en banc); *Baumgartner v. Director, OWCP*, 9 B.L.R. 1-65 (1986)(en banc). Failure to establish any one of these elements precludes entitlement to benefits.

Hearing Testimony

At the hearing on February 7, 2006, Claimant testified his formal education included making it through the third grade. Tr. at 11. Claimant then testified that he and his wife have been married for thirty-nine years and they have one daughter who is eighteen years of age. Tr. at 12. Claimant further testified that his daughter gave birth to a son on December 23, 2003, and he, Claimant, provided his daughter's and grandson's sole support. Tr. at 13-14.

Claimant also testified that he was laid off from Whitaker Coal Co. in 1995 and that was the last he worked in coal mining. Tr. at 14. Claimant testified to running the continuous miner for Whitaker Coal and that it was a very dusty job. Tr. at 15. Claimant then testified that his job required him to regularly lift more than fifty pounds. Tr. at 15-16. Of the fourteen years Claimant ran the continuous miner, he testified to doing it by remote box for four of those years. It was stipulated that Claimant had at least fourteen (14) years of qualifying coal mine employment. Tr. at 17.

Claimant testified to numerous health problems, including a heart attack, a kidney removed with cancer and prostate cancer. Tr. at 18. Claimant also testified to having breathing problems, shortness of breath, and having to use an Advair inhaler. Tr. at 18-19. Claimant next testified that Dr. Chaney treats him for his breathing problems and that he can not afford to buy most of the medicines he is prescribed. Tr. at 19-20. He further testified that he had been hospitalized for his breathing problems eight or nine years ago. Tr. at 20. He also testified that his breathing problems have increased over the last three to four years. Tr. at 21. He also testified that much of his daily activities have been curtailed because of his breathing problems, and that all he can do at present is help cook and help wash dishes. *Id.* Claimant testified that Dr. Chaney has also prescribed a proventilin inhaler and numerous other pills for his breathing problems. Tr. at 22-23. Claimant also testified that because of his breathing problems, it took him three to four days to cut the grass in his small yard. Tr. at 23.

[8] As the miner last engaged in coal mine employment in the State of Kentucky, appellate jurisdiction of this matter lies with the Sixth Circuit Court of Appeals. *Shupe v. Director, OWCP*, 12 B.L.R. 1-200, 1-202 (1989)(en banc).

On cross exam, the Claimant testified that his grandson has a Medicaid card. Tr. at 24. He also testified that his daughter gets support from the WIC program for her son. Tr. at 24-25. Finally, Claimant testified that no one has gone after his grandson's father for child support because they do not get along, stating, "Her and [Grandson's] dad had problems. She don't want him around anymore, so we don't bother with nothing. They had problems that could kill." Tr. at 25.

Existence of Pneumoconiosis and its Etiology

Under the amended regulations, "pneumoconiosis" is defined to include both clinical and legal pneumoconiosis:

> (a) For the purpose of the Act, "pneumoconiosis" means "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." This definition includes both medical, or "clinical", pneumoconiosis and statutory, or "legal", pneumoconiosis.
>
> > (1) Clinical Pneumoconiosis. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. The definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.
> >
> > (2) Legal Pneumoconiosis. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.
>
> (b) For purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.
>
> (c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

20 C.F.R. § 718.201. Moreover, the regulations at 20 C.F.R. § 718.203(b) provide that, if a miner suffers from pneumoconiosis and has engaged in coal mine employment for ten years or

more, as in this case, there is a rebuttable presumption that the pneumoconiosis arose out of such employment.

Medical Evidence[9]

The existence of pneumoconiosis may be established by any one or more of the following methods: (1) chest x-rays; (2) autopsy or biopsy; (3) by operation of presumption; or (4) by a physician exercising sound medical judgment based on objective medical evidence. 20 C.F.R. § 718.202(a).[10]

When weighing chest x-ray evidence, the provisions at 20 C.F.R. § 718.202(a)(1) require that "where two or more X-ray reports are in conflict, in evaluating such X-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays."[11] In this vein, the Board has held that it is proper to accord greater weight to the interpretation of a B-reader or Board-certified radiologist over that of a physician without these specialized qualifications. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985); *Allen v. Riley Hall Coal Co.*, 6 B.L.R. 1-376 (1983). Moreover, an interpretation by a dually-qualified B-reader and Board-certified radiologist may be accorded greater weight than that of a B-reader. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985); *Sheckler v. Clinchfield Coal Co.*, 7 B.L.R. 1-128 (1984). The following chest roentgenogram evidence is in the record:

Exhibit	Date of X-ray	Date of Reading	Physician/ Qualifications	Interpretation
Dx. 9(a); Dx. 1, at 171	6/17/02	6/17/02	Simpao - N/A	2/3
Dx. 11	6/17/02	7/9/03	Wheeler – B & BCR	No CWP *
Dx. 10	3/27/03	3/27/03	Dahhan – B	No CWP
Dx. 8	6/30/03	6/30/03	Patel – B & BCR	1/2
Dx. 12	6/30/03	11/21/03	Scott – B & BCR	No CWP *
Dx. 13	11/24/03	11/24/03	Broudy – B	1/1

* Rebuttal evidence

Based on the foregoing, the miner has established that he suffers from pneumoconiosis. There are four new separate x-rays submitted for evidence in this claim. The earliest x-ray, taken

[9] Only medical evidence submitted subsequent to the May 2, 2001 Decision and Order on Remand – Denying Benefits, is summarized herein. All other evidence was summarized, or incorporated, in Judge Jansen's May 2, 2001 opinion and is incorporated herein.

[10] There is no autopsy or biopsy evidence in this record and the presumptions contained at §§ 718.304 - 718.306 are inapplicable such that these methods of demonstrating pneumoconiosis will not be discussed further.

[11] A"B-reader" (B) is a physician, but not necessarily a radiologist, who successfully completed an examination in interpreting x-ray studies conducted by, or on behalf of, the Appalachian Laboratory for Occupational Safety and Health (ALOSH). A designation of "Board-certified" (BCR) denotes a physician who has been certified in radiology or diagnostic roentgenology by the American Board of Radiology or the American Osteopathic Association. An "A-reader" is a physician, but not necessarily a radiologist, who submitted six x-ray studies of his or her clients to ALOSH of which two studies are interpreted as positive for the existence of pneumoconiosis, two studies are negative, and two studies demonstrate complicated pneumoconiosis.

on 6/17/02, was read by Dr. Simpao as positive for coal workers' pneumoconiosis (CWP), a 3/2 profusion. This same x-ray was read on rebuttal by Dr. Wheeler as negative for CWP. Dr. Simpao has neither B nor BCR qualifications, Dr. Wheeler has both. Normally, this difference in qualifications would be enough to more totally offset Dr. Simpao's positive reading, but given the totality of the record, I will simply afford Dr. Simpao's reading slightly less weight. Dr. Wheeler has rated the film quality as grade 3, giving a reason as moderate underexposure and scapulae on lung periphery. Whereas, Dr. Simpao rated the same film as 1 and Dr. Barrett did a reread of the same film for quality only and also rated the film as grade 1. Dr. Barrett has both B & BCR qualifications. A rating of grade 1 is more consistent and hence I will not weigh Dr. Wheeler's negative rebuttal as strongly as I may have otherwise.

An additional x-ray was taken on 3/27/03, and read on the same day by Dr. Dahhan as negative for CWP. Dr. Dahhan is a B-reader. Subsequently, Dr. Patel, in the DOL sponsored complete pulmonary workup, took an x-ray on 6/30/03 and read it the same day as positive for CWP, a profusion of 1/2. Dr. Patel is both a B-reader and BCR. Dr. Scott rebutted the 6/30/03 x-ray when he read the same on 11/21/03 as negative for CWP. Dr. Scott is also both a B-reader and BCR. The most recent x-ray was taken by Dr. Broudy on 11/24/03 and read on the same day as positive for CWP, with a profusion of 1/1. Dr. Broudy is a B-reader.

In summarizing the x-ray readings, Dr. Simpao's 2/3 positive reading is given slightly less weight based on Dr. Wheeler's negative reading of the same x-ray. Dr. Patel's positive 1/2 rating is counterbalanced by Dr. Scott's negative reading of the same x-ray. Dr. Dahhan's negative interpretation stands unrebutted. Finally, Dr. Broudy's 1/1 positive reading also stands unrebutted. I find the strong indication of CWP demonstrated by Dr. Simpao's 2/3 reading taken in conjunction with the two additional positive readings enough to meet Claimant's burden. It is acknowledged that Dr. Simpao lacks the B or BCR qualifications for an x-ray reader, but it is also acknowledged that Dr. Simpao's name was chosen from a list of doctors supplied by the DOL. *See generally Sexton v. Director, OWCP*, 752 F.2d 213 (6th Cir. 1985)(an ALJ may use any reasonable method to determine the weighing of physician's qualifications in determining x-ray evidence). Therefore, taken in its entirety, there is ample x-ray evidence in the record for the Claimant to meet his burden of showing, by a preponderance of the evidence, that he has pneumoconiosis.

The final method by which Claimant may establish that he suffers from the disease is by well-reasoned, well-documented medical reports. A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987). An opinion may be adequately documented if it is based on items such as a physical examination, symptoms, and the patient's history. *See Hoffman v. B&G Construction Co.*, 8 B.L.R. 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 B.L.R. 1-295 (1984).

A "reasoned" opinion is one in which the administrative law judge finds the underlying documentation adequate to support the physician's conclusions. *Fields, supra*. Indeed, whether a medical report is sufficiently documented and reasoned is for the administrative law judge as the finder-of-fact to decide. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc). Moreover, statutory pneumoconiosis is established by well-reasoned medical reports which

support a finding that the miner's pulmonary or respiratory condition is significantly related to, or substantially aggravated by, coal dust exposure. *Wilburn v. Director, OWCP*, 11 B.L.R. 1-135 (1988). The following medical reports were admitted as evidence in the record:

Narrative Medical Evidence

D.L. Rasmussen, M.D., examined Claimant on June 30, 2003 on behalf of the DOL as the initial required examination; the examination is labeled Dx.8 and consists of thirty-one pages. Dr. Rasmussen provided a full pulmonary workup, including chest x-ray, a pulmonary functions test, an arterial blood gas study, interviewed the patient and did a complete physical exam. Dr. Rasmussen considered approximately a twenty pack-year smoking history and a fourteen year coal mine employment history. Claimant's employment history included considerable heavy and some very heavy manual labor, including lifting in excess of fifty pounds regularly. Dr. Rasmussen is board certified in Internal Medicine and Forensic Medicine; in addition he is a Senior Disability Analyst and Diplomate, with the American Board of Disability Analyst.

Dr. Rasmussen diagnosed the Claimant with pneumoconiosis and opined that it arose from his coal mine employment. He further classified the Claimant with a minimal impairment and at least a minimal loss of lung function and stated that he is no longer capable of performing very heavy manual labor. Additionally, Dr. Rasmussen opined that Claimant did not have the ability to perform any continued manual labor, and ascribed this condition to his early anabolic threshold. He attributed two risk factors to his impairment, Claimant's smoking history and his coal mine employment. When describing Claimant's impairment, Dr. Rasmussen opined that his coal mine dust exposure is a significant contributing factor. I found Dr. Rasmussen's report to be both well reasoned and well documented. It was also internally consistent and as such I assign it greater weight.

George R. Chaney, M.D., provided a medical report dated June 10, 2002 in which he diagnosed Claimant with CWP. He bases that opinion on a chest x-ray and pulmonary functions test.[12] Dr. Chaney has been the Claimant's treating physician for over eight years. Dx. 1, at 64, 65; Tr. at 19, 20. Dr. Chaney has seen the Claimant, on average, three times per year for his breathing problems since 1997; these office visits have included treatment for bronchitis and COPD. Ex. 2; Dx. 1, at 74-143. In Dr. Chaney's June 10, 2002 medical report he opines that Claimant has a pulmonary disease that was caused, at least in part, by exposure to coal dust. He bases this diagnosis on patient's history, multiple examinations, an abnormal chest x-ray and an abnormal pulmonary functions test. He further opines that Claimant does not have the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust free environment.

The record clearly states that Dr. Chaney has treated the Claimant for his respiratory condition. The treatment records demonstrate that Dr. Chaney evaluates the Claimant's respiratory health at regular intervals. The treatment records cover a period from January 1997 to March 2002. In this period, the Claimant has been examined by Dr Chaney, on average, three times annually for his respiratory problems. The frequency of Claimant's office visits for respiratory problems has increased over the years. Dr. Chaney prescribes Claimant's

[12] Neither of which is in the record.

medications for his respiratory ailments. I find that the record supports a finding that Dr. Chaney is Claimant's treating physician in accordance with the regulatory factors described in section 725.104(d).

The Sixth Circuit has held that "the opinions of treating physicians get the deference they deserve based on their power to persuade." *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513 (6th Cir. 2003). However the court has also cautioned that treating physician opinions are not entitled to automatic deference or controlling weight. *Id*. *See also Peabody Coal Co. v. Odom*, 342 F.3d 486, 492 (6th Cir. 2002).

I do not allocate Dr. Chaney's report any increased weight. I find it persuasive in that he was Claimant's treating physician. But also note that Dr. Chaney's qualifications are not in the record, and the objective testing he relied on to diagnose Claimant's CWP (chest x-rays, pulmonary function tests) are not in the record. As such, I acknowledge Dr. Chaney's diagnoses, but assign them no heightened or controlling weight.

Valentino S. Simpao, M.D., examined Claimant on June 17, 2002 on behalf of the DOL as the initial required examination; the examination is labeled Dx. 9a and consists of twenty-eight pages.[13] Dr. Simpao provided a full pulmonary workup, including chest x-ray, a pulmonary functions test, arterial blood gas study and performed a physical exam. Dr. Simpao considered a fourteen year coal mine employment history and approximately a twelve pack-year smoking history. Claimant's employment history contained heavy manual labor, including lifting in excess of fifty pounds regularly. Dr. Simpao diagnosed the Claimant with CWP and categorized his pulmonary impairment as a moderate impairment. Additionally, Dr. Simpao opined that Claimant did not have the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. He based this opinion on the objective findings of the chest x-ray, arterial blood gas study, EKG, pulmonary function tests, along with physical findings and symptomatology. Dr. Simpao is board certified in Internal Medicine with a subspecialty in Pulmonary Medicine. Dr. Simpao's opinion is well reasoned and as such I assign it the normal weight.

A. Dahhan, M.D., examined Claimant on March 27, 2003 on behalf of the Employer; the examination is labeled Dx. 10 and consists of twenty-one pages.[14] Dr. Dahhan provided a full pulmonary workup, including chest x-ray, a pulmonary functions test, arterial blood gas study and performed a physical exam. Dr. Dahhan considered a fourteen year coal mine employment history and approximately an eighteen pack-year smoking history. Dr. Dahhan opined that there are insufficient objective findings to justify a diagnosis of CWP. Furthermore, he opined that the Claimant retains the respiratory capacity to continue his previous coal mining work or a job of comparable physical demand. Dr. Dahhan stated that even if there was x-ray evidence of simple CWP the Claimant would still retain the physiological capacity to continue his previous coal

[13] This was the required DOL medical report from the claim that was filed April 9, 2002 and subsequently improperly withdrawn as outlined in the procedural history *supra*. This examination record is also located in the administratively closed file, Dx. 1, at 145-71.

[14] It should be noted that had this claim been processed under the amended regulations that govern the development of evidence, 20 C.F.R. § 725.414, this medical opinion would have been excluded because it is based in part on what would have been inadmissible evidence.

mining job, or similarly comparable physical work. Dr. Dahhan is board certified in Internal Medicine with a subspecialty in Pulmonary Medicine.

I find Dr. Dahhan's opinion to not be well reasoned or internally consistent. Dr. Dahhan provides no explanation for why Claimant's fourteen year operation of a continuous miner, a notoriously dusty job, would have no affect on his pulmonary impairment. Additionally, Dr. Dahhan notes that Claimant did not have the physical wherewithal to perform the mild exercise associated with an arterial blood gas study, and suffers dyspnea on the exertion of climbing a half-flight of stairs, but then still retains the respiratory capacity to perform the heavy labor needed in his past coal mine employment. Dr. Dahhan, at one place in his opinion diagnosed the Claimant with COPD, chronic bronchitis and emphysema, and then elsewhere stated he was physiologically capable, from a respiratory standpoint, to perform the labor necessary for his prior coal mine employment. It seems implausible, based on what is otherwise consistently in the record as to Claimant's physical capacity and respiratory function, that he could regularly lift over fifty pounds and operate equipment for an eight-hour day in an underground coal mine. For the aforementioned reasons I assign this opinion diminished weight.

Bruce C. Broudy, M.D., examined Claimant on November 23, 2003 on behalf of the Employer; the examination is labeled Dx. 13 / Ex. 1 and consists of twenty pages.[15] Dr. Broudy provided a full pulmonary workup, including chest x-ray, a pulmonary functions test, arterial blood gas study and performed a physical exam. Dr. Broudy considered a fourteen year coal mine employment history and approximately an eighteen pack-year smoking history. Dr. Broudy diagnosed the Claimant with CWP, based on an x-ray reading showing a profusion of 1/1. He also diagnosed claimant with mild COPD. He opines that the mild COPD is from Claimant's cigarette smoking and not from his exposure to coal dust. He further opines that Claimant retains the respiratory capacity to perform the work of an underground coal miner or to do similarly arduous manual labor. Dr. Broudy is board certified in Internal Medicine with a subspecialty in Pulmonary Medicine.

I find Dr. Broudy's opinion to not be well reasoned or internally consistent. Dr. Broudy diagnosed Claimant with mild COPD and opines its etiology to be entirely smoking related with no explanation why this pulmonary impairment would not, at least in apart, arise from or be aggravated by Claimant's fourteen years in an underground coal mine operating a continuous miner, a notoriously dusty job. Dr. Broudy, while diagnosing the Claimant with mild COPD, also opines that Claimant retains the respiratory capacity to perform the labor necessary for his prior coal mine employment. Again, much as with Dr. Dahhan's opinion, it appears implausible, based on what is otherwise consistently in the record as to Claimant's physical capacity and respiratory function, that he could regularly lift over fifty pounds and operate equipment for an eight-hour day in an underground coal mine. For the aforementioned reasons I assign this opinion diminished weight.

[15] Dr. Broudy does not state what medical records he reviewed in the course of his opinion, just that he reviewed the records provided by the Employer. Assuming that the records provided to Dr. Broudy were the same records provided to Dr. Dahhan, then, if this claim were being decided under the amended regulations at 20 C.F.R. § 725.414, Dr. Broudy's medical opinion would have been excluded for relying on prohibited evidence.

Hence, Claimant has additionally proven the existence of pneumoconiosis by a physician exercising sound medical judgment, based on objective medical evidence. § 718.202(a)(4). The aforementioned medical opinions show by a preponderance of the evidence that Claimant is afflicted with pneumoconiosis.

Causation of Pneumoconiosis

Once pneumoconiosis is established, the burden is upon the Claimant to demonstrate by a preponderance of the evidence that the pneumoconiosis arose out of the miner's coal mine employment. This can be established as follows, "[i]f a miner who is suffering or has suffered from pneumoconiosis was employed for ten years or more in one or more coal mines, there is a rebuttable presumption that the pneumoconiosis arose out of such employment." 20 C.F.R § 718.203(b).

I have found that Claimant was a coal miner for fourteen years, and that he had pneumoconiosis. Claimant is entitled to the presumption that his pneumoconiosis arose out of his employment in the coal mines. No physician opining as to the presence of pneumoconiosis offers a plausible alternative theory to rebut this presumption. *See Smith v. Director, OWCP*, 12 B.L.R. 1-156 (1989). Therefore, I find that Claimant's pneumoconiosis arose from his coal mine employment.

Total Disability

A miner is considered totally disabled when his pulmonary or respiratory condition prevents him from performing his usual coal mine work or comparable work. 20 C.F.R. § 718.204(b). Non-respiratory and non-pulmonary impairments have no bearing on a finding of total disability. *See Beatty v. Danri Corp.*, 16 B.L.R. 1-11, 1-15 (1991). Section 718.204(b) provides several criteria for establishing total disability. Under this section, the ALJ must first evaluate the evidence under each subsection and then weigh all of the probative evidence together, both like and unlike, to determine whether Claimant has established total respiratory disability. *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195, 1-198 (1987).

Twenty C.F.R. § 718.204(b) provides the following five methods to establish total disability: (1) qualifying pulmonary function studies; (2) qualifying blood gas studies; (3) evidence of cor pulmonale with right-sided congestive heart failure;[16] (4) reasoned medical opinions; and (5) lay testimony.[17]

Total disability may be established through a preponderance of qualifying pulmonary function studies. The quality standards for pulmonary function studies are located at 20 C.F.R. § 718.103 and require, in relevant part, that (1) each study be accompanied by three tracings, *Estes v. Director, OWCP*, 7 B.L.R. 1-414 (1984), (2) the reported FEV1 and FVC or MVV values constitute the best efforts of three trials, and, (3) for testing conducted after January 19,

[16] There is no evidence of cor pulmonale with right-sided congestive heart failure such that this method of establishing total disability will not be discussed further.

[17] The Board holds that a judge cannot rely solely upon lay evidence to find total disability in a living miner's claim. Tedesco v. Director, OWCP, 18 B.L.R. 1-103 (1994).

2001, a flow-volume loop must be provided. The ALJ may accord lesser weight to those studies where the miner exhibited "poor" cooperation or comprehension. *Houchin v. Old Ben Coal Co.*, 6 B.L.R. 1-1141 (1984); *Runco v. Director, OWCP*, 6 B.L.R. 1-945 (1984). To be qualifying, the regulations provide that the FEV1 be qualifying *and* either (1) the MVV or FVC values must be equal to or fall below those values listed at Appendix B for a miner of similar gender, age, and height, or (2) the result of the FEV1 divided by the FVC is equal to or less than 55 percent. The following pulmonary function studies are in the record:

Pulmonary Function Studies

Exhibit No.	Physician	Date of Study	Age/ Height	Broncho-Dilator?	FEV1	FVC	FEV1/ FVC	Qualify-ing
Dx. 9	V. Simpao	6/17/02	63/67"	N	2.74	4.28	64%	No
Dx. 10	A. Dahhan	3/27/03	64/67"	N	2.13	2.91	73%	No
				Y	2.17	2.94	74%	No
Dx. 8	Rasmussen	6/30/03	64/67"	N	2.45	3.81	64%	No
Dx. 13	B. Broudy	11/24/03	64/68"*	N	2.17	3.22	67%	No
				Y	2.32	3.41	68%	No

***** Correcting for the 1" height difference by Dr. Broudy does not make the results qualifying.

Based upon the foregoing, the Claimant has not established total disability pursuant to § 718.204(b)(2)(i) of the regulations. None of the studies produced qualifying results.

Total disability may also be established by qualifying blood gas studies under 20 C.F.R. § 718.204(b)(2)(ii) . In order to be qualifying, the PO2 values corresponding to the PCO2 values must be equal to or less than those found at the table at Appendix C. The following blood gas studies are in the record:

Arterial Blood Gas Studies

Exhibit No.	Physician	Date of Study	pCO2	pO2	Resting R Exercising E	Qualifying
Dx. 9	V. Simpao	6/17/03	36.3	80.5	R	No
Dx. 10	A Dahhan	3/27/03	35.7	78.7	R	No
Dx. 8	Rasmussen	6/30/03	33	74	R	No
Dx. 13	Broudy	11/24/03	33.4	83.2	R	No

Based upon the foregoing, the miner has not demonstrated total disability pursuant to § 718.204(b)(2)(ii) of the regulations. There were no qualifying results in the records.

The final method by which Claimant may establish total disability is through medical opinion evidence wherein a physician has exercised reasoned medical judgment based on medically acceptable clinical and laboratory diagnostic techniques to conclude that the miner's respiratory or pulmonary condition prevents him from engaging in his usual coal mine employment or comparable employment. 20 C.F.R. § 718.204(b)(2)(iv).

Initially, Claimant has the burden of establishing the exertional requirements of his usual coal mine employment. *Onderko v. Director, OWCP*, 14 B.L.R. 1-2 (1989). Once a claimant establishes that he is unable to perform his usual coal mine employment, a *prima facie* case for total disability exists and the burden shifts to the party opposing entitlement to prove that the claimant is able to perform comparable and gainful work. *Taylor v. Evans and Grambrel Co.*, 12 B.L.R. 1-83, 1-87 (1988).

Claimant appeared credible and testified at the hearing that he last worked as a coal miner in April 1995. He described his job duties as operating a continuous miner. This consisted of having to move and hang cable regularly; the cable was often over fifty pounds in weight. Based on this record, it is determined that Claimant performed heavy labor. Comparing the exertional requirements of his last coal mining job with the physical limitations demonstrated on this record, it is determined that Claimant has established that he is totally disabled under 20 C.F.R. § 718.204(b)(2)(iv) through a preponderance of the medical opinion evidence of record.

I have considered all of the evidence in the record and assigned appropriate weighting where needed. As described above I found the opinions of Drs. Broudy and Dahhan to not be well reasoned or internally consistent. Therefore, where they opined that Claimant has the respiratory capacity to return to his normal coal mining job, those opinions are assigned less weight. Whereas, Drs. Rasmussen and Simpao both opined that Claimant no longer had the respiratory capacity to continue in his prior coal mining job or to do a job of equivalent exertional requirements. I found their opinions to be well reasoned and as such they were assigned greater weight than Drs. Broudy and Dahhan's opinions. Also, I note that Claimant's treating physician, Dr. Chaney, has opined that he does not have the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. Hence, I find the Claimant has proven by a preponderance of the medical opinion evidence that he is totally disabled.

Total Disability Due to Pneumoconiosis

Section 718.204(c) contains the standard for determining whether a miner's total disability was caused by pneumoconiosis. A miner is totally disabled due to pneumoconiosis if pneumoconiosis, as defined in section 718.201, is a "substantially contributing cause" of the miner's totally disabling respiratory or pulmonary impairment. 718.204(c)(1). Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it has a material adverse effect on the miner's respiratory or pulmonary condition or if it materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. 20 C.F.R. §§ 718.204(c)(1)(i), (ii). Section 718.204(c)(2) states that, except as provided in Sections 718.305 and 718.204(b)(2)(iii), proof that the miner suffered from a totally disabling respiratory or pulmonary impairment as defined by Sections 718.204(b)(2)(i), (ii), (iv), and 718.204(d) shall not, by itself, be sufficient to establish that the miner's impairment was due to pneumoconiosis.

Except as provided by Section 718.204(d), the cause or causes of a miner's total disability shall be established by means of a physician's documented and reasoned medical report. 20 C.F.R. § 718.204(c)(2).

The Sixth Circuit Court of Appeals has stated that pneumoconiosis must be more than a "de minimus or infinitesimal Contribution" to the miner's total disability. *Peabody Coal Co. v. Smith*, 12 F. 3d 504, 506-07 (6th Cir. 1997).

The Sixth Circuit has also held that a claimant must affirmatively establish only that his totally disabling respiratory impairment (as found under Section 718.204) was due "at least in part" to his pneumoconiosis. *Cf.* 20 C.F.R. 718.203(a); *Adams v. Director, OWCP*, 886 F.2d 818, 825 (6th Cir. 1988); *Cross Mountain Coal Co. v. Ward*, 93 F.3d 211, 218 (6th Cir. 1996)(opinion that miner's impairment is due to his combined dust exposure, coal workers' pneumoconiosis as well as his cigarette smoking history is sufficient). More recently, in interpreting the amended provision at Section 718.204(c), the Sixth Circuit determined that entitlement is not precluded by "the mere fact that a non-coal dust related respiratory disease would have left the miner totally disabled even without exposure to coal dust." *Tennessee Consolidated Coal Co. v. Director*, OWCP [*Kirk*], 264 F.3d 602 (6th Cir. 2001). A miner "may nonetheless possess a compensable injury if his pneumoconiosis materially worsens this condition." *Id*.

The reasoned medical opinions of those physicians who diagnosed the existence of pneumoconiosis and that the miner was totally disabled are more reliable for assessing the etiology of the miner's total disability. *See, e.g. Hobbs v. Clinchfield Coal Co*., 45 F.3d 819 (4th Cir. 1995); *Toler v. Eastern Assoc. Coal Co*., 43 F.3d 109 (4th Cir. 1995).

Dr. Rasmussen opined that Claimant is no longer capable of performing heavy manual labor. He additionally stated that Claimant did not have the ability to perform any continued manual labor, and ascribed this condition to his early anabolic threshold. Dr. Rasmussen attributed two risk factors to his impairment, Claimant's smoking history and his coal mine employment. Dr. Rasmussen had access to an accurate estimation of Claimant's coal mine employment and smoking history. When describing the etiology of Claimant's pulmonary impairment Dr. Rasmussen listed both his coal mine employment and cigarette smoking, opining that Claimant's coal mine dust exposure is a significant contributing factor.

Dr. Chaney opined that Claimant did not have the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. Dr. Chaney opined that the etiology of Claimant's impairment arose from his CWP. He based this opinion on the objective findings of a chest x-ray and pulmonary functions test, multiple examinations and his long history with the patient as his treating physician. It is not in the record if Dr. Chaney based this opinion on an accurate appraisal of Claimant's coal mine employment and smoking history. As such, I assign no heightened weight to Dr. Chaney's medical report, even though he has a long history with the Claimant as his treating physician.

Dr. Simpao opined that Claimant did not have the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. Dr. Simpao opined that the etiology of Claimant's impairment arose from his pneumoconiosis. He based this opinion on the objective findings of the chest x-ray, arterial blood gas study, EKG, pulmonary function tests, along with physical findings and symptomatology. Dr. Simpao based this opinion

on an accurate appraisal of Claimant's coal mine employment and somewhat of an underestimation of Claimant's smoking history. Though, I find nothing in the record that would have me assign Dr. Simpao's opinion less weight based on a difference of six pack-years of cigarette smoking.

Dr. Dahhan found that Claimant did not have pneumoconiosis, nor did he find that he was totally disabled. Dr. Dahhan opined that Claimant was capable of returning to his prior job of coal mine employment or a comparably strenuous job. Dr. Dahhan had an accurate record of Claimant's coal mine employment and smoking history.

Dr. Broudy, though finding Claimant positive for CWP, did not find that he was totally disabled. Dr. Broudy opined that Claimant retains the respiratory capacity to perform the work of an underground coal miner or to do similarly arduous manual labor. Dr. Broudy also had an accurate appraisal of Claimant's coal mine employment and smoking history.

As stated earlier, I found Drs. Rasmussen and Simpao's opinions to be well reasoned and well documented and as such to give them greater weight than Drs. Dahhan and Broudy's opinions, which I did not find to be well reasoned or well documented. In addition, I find the opinion's of the doctors who diagnosed pneumoconiosis and total disability to be more reliable in determining the causation of that disability. Finally, I do take note of Dr. Chaney's diagnosis of CWP and his opinion of Claimant's inability to return to coal mining work or to perform comparable work in a dust free environment. For all of the aforementioned reasons, I find by a preponderance of the evidence that Claimant has established that he is totally disabled due to pneumoconiosis.

Claimant has established that he has pneumoconiosis and that it arose out of coal mine employment. In addition, Claimant has established that he is totally disabled due to pneumoconiosis. Accordingly, Claimant is entitled to benefits.

ENTITLEMENT

Claimant is entitled to benefits commencing on the date the medical evidence first establishes that he became totally disabled due to pneumoconiosis or, if such a date cannot be determined from the record, the month in which the miner filed his claim which, in this case, is March 1996. 20 C.F.R. § 725.503; *Carney v. Director, OWCP*, 11 B.L.R. 1-32 (1987); *Owens v. Jewell Smokeless Coal Corp.*, 14 B.L.R. 1-47 (1990). However, the filing date should not be used if uncontradicted medical evidence establishes that the claimant was not totally disabled at some point after the claim was filed. *Edmiston v. F & R Coal Co.*, 14 B.L.R. 1-65, 1-69 (1990). Moreover, it is noteworthy that the date of the first medical evidence of record indicating total disability does not establish the onset date; rather, such evidence only indicates that the miner became totally disabled at some prior point in time. *Tobrey v. Director, OWCP*, 7 B.L.R. 1-407, 1-409 (1984); *Hall v. Consolidation Coal Co.*, 6 B.L.R. 1-1306, 1-1310 (1984).

A miner's award of benefits should be augmented on behalf of a dependent spouse or child who meets the conditions of relationship pursuant to section 725.210. For the miner's

benefits to be supplemented because of any of these relationships, the individual must qualify under both a relationship test and dependency test.

Claimant and Mary Katherine Smith were married on January 8, 1966. Dx. 1, at 686. I find that the Claimant's wife is a dependent spouse for purposes of augmentation of benefits pursuant to sections 725.204 and 725.205.

Claimant's daughter Ashley was born December 15, 1987. Dx. 1, at 685. I find that Claimant's daughter is a dependent child for purposes of augmentation of benefits pursuant to sections 725.208 and 725.209.

Claimant's grandson Jordan was born December 23, 2003. Tr. at 13. Claimant provided no authority in his post-hearing brief to justify the claim that Jordan is a qualifying dependent for purposes of augmentation. There is no evidence in the record that Claimant's grandson is a qualifying dependent under any of the criteria in 725.208. As such, Jordan does not qualify as a dependent for purposes of augmentation. Claimant has two qualifying dependents for purposes of augmentation, his wife and his daughter.

Upon review of the record in this case, it is determined that the onset date cannot be determined from the medical evidence and, therefore, benefits are payable from March 1, 1996, the month in which the miner's claim was filed. Accordingly,

ORDER

IT IS ORDERED that the claim for benefits filed by Claimant is granted and the payment of all benefits to which he is entitled shall commence as of March 1, 1996.

IT IS FURTHER ORDERED that, within 30 days of the date of issuance of this *Decision,* Claimant's counsel shall file, with this Office and with opposing counsel, a petition for a representatives' fees and costs in accordance with the regulatory requirements set forth at 20 C.F.R. § 725.366. Counsel for the Director and for Employer shall file any objections with this Office and with Claimant's counsel within 20 days of receipt of the petition for fees and costs. It is requested that the petition for services and costs clearly provide (1) counsel's hourly rate with supporting argument or documentation, (2) a clear itemization of the complexity and type of services rendered, and (3) that the petition contains a request for payment for services rendered and costs incurred before this Office only as the undersigned does not have authority to adjudicate fee petitions for work performed before the district director or appellate tribunals. *Ilkewicz v. Director, OWCP*, 4 B.L.R. 1-400 (1982).

A

Daniel A. Sarno, Jr.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.478 and 725.479. The address of the Board is:

Benefits Review Board
U.S. Department of Labor
P.O. Box 37601
Washington, DC 20013-7601

Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481. If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).